

REFUSAL OF RICHARD V. SECORD TO TESTIFY

MARCH 19 (legislative day, MARCH 13), 1987.—Ordered to be printed

Mr. INOUE, from the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, submitted the following

REPORT

On February 23, 1987, Richard V. Secord was subpoenaed to appear before the Senate Select Committee on Military Assistance to Iran and the Nicaraguan Opposition ("Committee"). The Committee sought Mr. Secord's appearance for the purpose of obtaining his consent to the release of highly relevant bank records that would otherwise be protected from disclosure by foreign bank secrecy laws. Mr. Secord refused to sign a "consent directive" authorizing the release of such records.

This report recommends that the Senate adopt a resolution authorizing the Senate Legal Counsel to institute suit to compel Mr. Secord to sign a directive for the release of foreign bank records. In support of this recommendation, and so that the Senate has "all relevant information before it when making its determination," Senate Committee on Governmental Affairs, *Report on Public Officials Integrity Act of 1977*, No. 95-170, 95th Cong., 1st Sess. 91 (1977), this report sets forth the following information:

- (A) the procedure followed in issuing the subpoena and order;
- (B) the extent to which the party subpoenaed has complied with the Committee's subpoena and order;
- (C) any objections or privileges raised by the subpoenaed party; and
- (C) the comparative effectiveness of bringing a civil action under this section, certification of a criminal action for contempt of Congress, and initiating a contempt proceeding before the Senate. Ethics in Government Act of 1978, sec. 705(c), 2 U.S.C. sec. 288d(e).¹

¹ Section 288d(c) of Title 2 requires that a proposed resolution directing the Senate Legal Counsel to bring a civil action to enforce a subpoena must be accompanied by a report setting forth this information.

A. PROCEDURE FOLLOWED IN ISSUING THE SUBPOENA AND ORDER TO
RICHARD V. SECORD

Senate Resolution 23 created this Committee for the purpose of "conduct[ing] an investigation into, and study of, all matters" which relate to the "direct or indirect sale" of arms to Iran and "the use of the proceeds from any transaction . . . to provide assistance to any faction or insurgency in Nicaragua." Sen. Res. 23 sec. 1(b). One of the principal issues under investigation concerns how, by whom, and to whom monies may have been diverted from the United States arms sales or transfers to Iran. The Tower Board left these questions unanswered, but found that almost \$20 million dollars remains unaccounted for. *Report of the President's Special Review Board* at III-20, Feb. 26, 1987. Bank records of foreign accounts which the Committee believes are controlled by Mr. Secord may be central to tracing the money involved in these transactions.

The Tower Board found that Mr. Secord was involved not only in the sale of United States weapons to Iran, but also in aiding the resistance forces in Nicaragua. *Id.* at III-14, -21. For example, funds from the Iran sales were "deposited in Swiss bank accounts held in the name of Lake Resources and under the control of Richard Secord." *Id.* at III-19 to -20. Funds went into these accounts to reimburse the United States government for weapons sold to Iran, but "the price charged to Iran was far in excess of what was paid to the Department of Defense for the arms." *Id.* at III-20. The very same accounts may have been used to make funds available "for Mr. Secord's use in Central American operations." *Id.* at C-12.

Efforts have been made both by the Committee and the Justice Department to obtain the records of the Swiss Bank accounts through which the money apparently flowed. One avenue is the Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters [hereinafter "Treaty"],² which requires that any request by an investigatory authority be transmitted through a central agency. In the United States, that central authority is the Justice Department. See Treaty, art. 28. On behalf of the Independent Counsel, the Justice Department has already submitted a request for bank records to the Swiss central authority. We understand that Mr. Secord is among those who have lodged objections to this request with the appropriate Swiss authorities—objections which are only the first step in a lengthy series of appeals that must be resolved before any records will be produced. Based on communications with the Justice Department, the Independent Counsel's office, and the Swiss authorities, the Committee believes that the Treaty process will not elicit any information concerning Swiss accounts for quite some time.

Moreover, even if the Treaty process produces documents more quickly than anticipated, it is unlikely that the Senate Select Committee will be permitted access to those documents. Both the Justice Department and the Independent Counsel have taken the position that the Treaty only permits disclosure of information to prosecutorial authorities, and that the Committee is not such a body.

² 27 U.S.T. 2019 (signed, May 25, 1973; effective January 23, 1977).

By letter of March 9, 1987, the ranking members of both the House and Senate Committees investigating the Iran arms sales requested that the Independent Counsel forward any records he might obtain from the Swiss, and stated the Committees' position that the Treaty provides for disclosure to the Congressional Committees because they are investigating the same "offense," within the meaning of the Treaty, as is the Independent Counsel³ (Appendix A hereto). In response, the Independent Counsel informed the Committee, at a hearing held on March 11, 1987, that should any records be produced by the Swiss, he would feel bound not to transfer the records to the Committee based on his communications with the Swiss authorities. See Hearing Transcript at 80; see also *id.* at 73-74 (Appendix B hereto).

Given this position, and because of the inherent delay in the process, it is essential that the Committee pursue non-Treaty avenues to obtain the all-important bank records. The Committee has both the power and the obligation to "do everything necessary and appropriate under the laws and Constitution . . . to make the investigation and study" for which it was created. Sen. Res. 23, sec. 5(a). Among the non-Treaty avenues available to the Committee for production of the bank records is the consent the Committee has sought from Mr. Secord, and which Mr. Secord has refused to provide.

Specifically, the Committee asked Mr. Secord to waive his rights under foreign bank secrecy laws, and consent to the release of any relevant bank records, without admitting either the existence or his ownership or control of the underlying accounts or the records themselves. Mr. Secord has refused to sign such a directive, or to respond to the Committee's order requiring him to sign, asserting his Fifth Amendment right against self-incrimination. But the Fifth Amendment does not give Mr. Secord the right to hid behind foreign bank secrecy laws; nor would Mr. Secord's Fifth Amendment rights be violated by the consent which the Committee has asked him to furnish. See Secord Decl., Ex. A (the consent form). Thus, in several cases, courts of appeal have compelled such waivers, which take the form of a "consent directive" by which the witness agrees to waive the protection of foreign secrecy laws, and directs the release of any foreign bank records that the bank determines are held in the witness' name. See, e.g., *Ghidoni v. United States*, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984).

To obtain Mr. Secord's consent under this procedure, the Committee subpoenaed him to appear before it on February 26, 1987. This subpoena was issued pursuant to the Committee rules, and by virtue of the power granted it under Sen. Res. 23 "[t]o require by subpoena or order" the attendance of witnesses or the production of documents, as well as its power to do everything "necessary and appropriate under the law" to conduct this investigation. *Id.* secs. 5(a),(d); Committee Rules of Procedure 4.1.

³ See Treaty, art. I, sec. 1(a); see also Memorandum of Understanding between Switzerland and the United States, Sec. II, Par. 3(a) (1982).

B. EXTENT TO WHICH RICHARD V. SECORD COMPLIED WITH THE
COMMITTEE'S SUBPOENA AND ORDER

Prior to the date of the hearing, Mr. Secord's counsel informed the Committee's counsel that Mr. Secord would not sign a "consent directive" authorizing the release of any foreign bank records. Mr. Secord's refusal was based on Fifth Amendment grounds. To avoid a personal appearance before the Committee, Mr. Secord's counsel offered to provide the Committee with a declaration by Mr. Secord, asserting his privilege, and further stating, *inter alia*, that if Mr. Secord were ordered by the Committee to sign a consent, he would refuse to do so. Such a declaration was executed, and transmitted to Committee counsel, on February 26, 1987.

Also on Feb. 26, 1987, the Committee held a hearing at which it was informed by its counsel of Mr. Secord's objections to signing the consent directive. Mr. Secord's declaration and written objections were submitted to the Committee for its review. The declaration (Appendix C hereto) states as follows:

I have been notified by the Committee, through its counsel, that the Chairman of the Committee, at the hearing on February 26, 1987, will request me to sign the Consent Directive which is attached to this declaration as Exhibit B, and, if I refuse, that the Chairman will ask the Committee to order me to sign it. After consultation with my counsel I have decided not to sign the Consent Directive voluntarily. Secord Decl. Pars. 2, 3.

I have been provided, with the subpoena, with a copy of the order which the Chairman will ask the Committee to issue at its hearing on February 26, 1987, based on my refusal to sign the Consent Directive. . . . After consultation with my counsel, I have decided to refuse to obey the order or any substantially similar order of the Committee directing me to sign the Consent Directive. *Id.* Pars. 4, 5.⁴

After hearing from its counsel, and reviewing the Secord declaration, the Committee unanimously ordered Mr. Secord to sign the consent directive. See Appendix D (the Committee's order). Committee counsel promptly notified Mr. Secord of the Committee's order, and Mr. Secord's counsel confirmed that Mr. Secord would refuse to obey the Committee's order. See Appendix E (letter of Feb. 27, 1987).

Mr. Secord's refusal to comply with the Committee's order has frustrated the Committee in its efforts to answer critical questions relating to the flow of funds from the sales of arms to Iran to the Nicaraguan resistance forces. As noted above, the Tower Board found that Mr. Secord controls foreign accounts through which funds flowed in this matter; and, therefore, had Mr. Secord signed the consent, he would have provided the Committee with information crucial to the conduct of its investigation.

⁴The declaration also states that Mr. Secord waives "his opportunity to appear in person before the Committee" as well as "any and all procedural defenses and objections" to the enforcement of the Committee's order. Secord Decl. Pars. 6, 8.

C. OBJECTIONS OR PRIVILEGES RAISED BY MR. SECORD

In his declaration, Mr. Secord asserts that to sign the consent directive would violate his rights under the Fifth Amendment. Recognizing that three courts of appeal have rejected that very contention, Mr. Secord states simply that he "disagree[s] with that conclusion." Secord Decl. Ex. D at 1. He emphasizes, instead, that his principal reason for objecting is that "[s]igning the directive is the equivalent of speech," which the Fifth Amendment protects as long as it "might prove a significant link in a chain of evidence tending to establish his guilt." *Id.* Mr. Secord also objects on the grounds that: (1) the Committee should be required to pursue a Treaty request rather than seek consent from Mr. Secord; and (2) the Committee's order to sign the consent directive amounts to compulsion to make a false statement, since consent is not in fact freely given. *Id.* at 2. The Committee believes that these objections all lack merit, for the following reasons.

1. Mr. Secord's Rights Against Self-Incrimination Have Not Been Violated

The consent directive that the Committee ordered Mr. Secord to sign does not present an untested Fifth Amendment issue. Every court of appeal that has addressed the question has concluded that such a directive does not infringe upon a witness' Fifth Amendment rights. See, e.g., *Ghidoni v. United States*, 732 F.2d 814 (11th Cir.), cert. denied, 469 U.S. 932 (1984); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *In re United States Grand Jury Proceedings (Cid-Molina)*, 767 F.2d 1131 (5th Cir. 1985); accord *In re N.D.N.Y. Grand Jury Subpoena #86-0351-S*, No. 86-6264, slip op. (2d Cir. Feb. 4, 1987); *In re Grand Jury Proceedings, Thier*, 767 F.2d 1133, 1134 (5th Cir. 1985); see also *United States v. Browne*, 624 F. Supp. 245 (N.D.N.Y. 1985).⁵ While the issue has yet to reach the D.C. Circuit, the Committee believes that the D.C. Circuit would follow the consistent rulings of its fellow courts of appeal.

The uniform rejection of a Fifth Amendment claim in these cases is based on well-established principles. Thus, it is settled that the Fifth Amendment does not protect the contents of bank records. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974). It is only the "act of producing" such records that may be privileged. See *United States v. Doe*, 465 U.S. 605, 612 (1984), and that privilege only obtains if the act of production shows the existence, control, or authenticity of the bank records. See *id.* at 613 (quoting *Fisher v. United States*, 425 U.S. 391, 410 (1976)). In the case of a consent directive, the act of production is neither incriminating nor testimonial, because it is the bank, not the witness, who is producing the material. As the *Ghidoni* court reasoned, "nothing in the directive implies that such accounts exist. Rather, the directive states that if the accounts exist, the bank is permitted to disclose records of

⁵ The only case reaching a different result, comes from a district court in Texas, *In re Grand Jury Investigation, John Doe*, 599 F. Supp. 746 (S.D. Tex. 1984). That court's holding, however, was keyed to the particular consent form at issue, a form substantially different from the one presented to Mr. Secord. To the extent the decision is read to support any broader legal principle, it has been effectively overruled by the Fifth Circuit's subsequent decision in *In re United States Grand Jury Proceedings (Cid-Molina)*, 767 F.2d 1131 (5th Cir. 1985) (adopting *Ghidoni* reasoning); accord *In re Grand Jury Proceedings, Thier*, 767 F.2d 1133, 1134 (5th Cir. 1985).

those accounts to the government." 732 F.2d at 818 (emphasis in original). Similarly, "the directive makes no explicit statement regarding [the witness'] control of the accounts. Rather, the directive merely permits the bank to disclose information relating to any accounts with respect to which the *bank records* indicate [the witness'] authority to draw (i.e., any accounts with respect to which the bank *thinks* [the witness] has authority)." *Id.* (emphasis in original); see *Davis*, 767 F.2d at 1039-40; *Cid-Molina*, 767 F.2d at 1133; *N.D.N.Y. Grand Jury Subpoena*, slip op. at 1353-54; *Browne*, 624 F. Supp. at 248. Thus, by executing the consent directive, Mr. Secord would not "bear witness against himself"; it would be the bank, if anyone, that may bear witness against him.

Significantly, in his objections to the Committee, Mr. Secord does not dispute that the courts have unanimously "concluded that the consent directive is neither testimonial nor incriminating." Secord Decl., Ex. D at 1. Instead, Mr. Secord places principal reliance upon a claim that the consent amounts to "speech" that may be incriminating. See *id.* But whether the words are spoken or written does not determine the viability of a Fifth Amendment claim.⁶ The Fifth Amendment will not apply absent a "testimonial" communication. The Supreme Court has made it "clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence, but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976) (emphasis in original). Executing the consent directive, by signature or by reading it into the record, does not amount to a testimonial communication protected by the Fifth Amendment. See *Ghidoni*, 732 F.2d at 817-18; *Davis*, 767 F.2d at 1040; *N.D.N.Y. Grand Jury Subpoena*, slip op. at 1353-54.

Mr. Secord attempts to add force to his "speech" claim by arguing that signing the consent amounts to a "link" in a chain that may incriminate him, a theory which Mr. Secord claims the *Ghidoni* court did not expressly consider. But see *Ghidoni* 732 F.2d at 817 n.4 (discussing "link in the chain" statement). Secord Decl., Ex. D. The phrase "link in a chain" has been used most often in cases posing the question whether a witness is entitled to invoke the Fifth Amendment with respect to questions that do not strike at the heart of criminal liability. The Supreme Court has held that the Fifth Amendment does not only protect statements "that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant . . ." *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (defendant may invoke Fifth Amendment in response to question as to his occupation); see *Blau v. United States*, 340 U.S. 159 (1950).⁷

⁶ See *Bellis v. United States*, 417 U.S. 85, 87-88 (1974) ("It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony."); see also *Boyd v. United States*, 116 U.S. 616, 630 (1886).

⁷ *Marchetti v. United States*, 390 U.S. 39 (1968), on which Mr. Secord relies, uses the term "link in a chain" similarly. Faced with a Fifth Amendment challenge to registration and taxation requirements for those involved in wagering activities, the court concluded that the petitioner had a "real and appreciable" fear of prosecution, since registration "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." *Id.* at 48.

These cases do not relieve Mr. Secord of his obligation to establish that there is testimonial assertion here that gives rise to Fifth Amendment protection. While a "link" in the chain may be a necessary condition to the assertion of the privilege, it is not a sufficient one.⁸ As the court in *Ghidoni* said of the "link in the chain" argument relied upon by the dissent: "We do not necessarily disagree [with the dissents' general statement], but because we find no incriminating testimony in the contents of the directive or the fact that Ghidoni must sign, we need not address the incrimination element." *Id.* at 817 n.4 (emphasis in original). Without a testimonial communication, there can be no Fifth Amendment privilege. See *Fisher v. United States*, 425 U.S. 391, 410 (1976); *N.D.N.Y. Grand Jury Subpoena*, *supra*, slip op. at 1353-54 ("executing this directive would not implicate any testimonial communication").

But even if the directive did amount to a testimonial communication, it would not be incriminating. The consent directive communicates, at most, that Mr. Secord has parted with the protection of foreign bank secrecy laws. He is simply "remov[ing] an obstacle" to obtaining records that would otherwise bear no Fifth Amendment privilege at all. *Browne*, 624 F. Supp. at 249; See *Ghidoni*, 732 F.2d at 819 n.12. Were these accounts in the United States, there would be no possible Fifth Amendment objection. The result should be no different here, for Mr. Secord "does not acquire any rights under foreign bank secrecy laws which are cognizable in United States courts." *Browne*, 624 F. Supp. at 249. As the Supreme Court has held, the foreign bank secrecy laws do not provide a litigant with a shield in American courts. *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980).

2. The Swiss Treaty Provides Mr. Secord No Basis To Refuse to Sign the Consent Directive

Mr. Secord argues that, in the circumstances of this case, the committee "should be obliged to pursue a treaty request to its conclusion before it attempts to abridge Mr. Secord's constitutional rights." Secord Decl., Ex. D at 2. This misplaced claim should fail for the following reasons:

First, this is not Mr. Secord's objection to make. The Treaty involves government-to-government obligations. As the D.C. Circuit has recently held, an individual has no standing to enforce the terms of the Swiss Treaty. Indeed, the Treaty itself so states. *Cardenas v. Smith*, 733 F.2d 909, 918 (D.C. Cir 1984).⁹

⁸ If it were sufficient to show merely a "link" in the chain of incrimination, some of the most settled rules of Fifth Amendment law would fall. Thus, bank records may be a "link" in a chain, but their contents are not privileged. See *California Bankers Ass'n*, 416 U.S. 21, 55 (1974). Similarly, as was held in *Fisher v. United States*, the act of producing records may provide a "link" in the chain, but it is not necessarily incriminating, or testimonial. 425 U.S. 391 (1976) (defendant taxpayer may not invoke privilege for the act of producing work papers prepared by the taxpayer's accountant).

⁹ Faced with a similar attempt by a litigant in a *Ghidoni* case to inject foreign interests into what is a basic Fifth Amendment case, one court appropriately responded: "[S]uch an inquiry is not necessary at this stage of the proceedings before a formal request or subpoena is issued to the banks along with the signed releases. . . . [T]his argument is more appropriately raised by the foreign banks which are subject to the secrecy laws . . . it is not an appropriate basis for defendant's refusing to sign the release form." *Browne*, 624 F. Supp. at 248 n.3; cf. *Davis*, 767 F.2d at 1033-35 (analyzing foreign interests); *N.D.N.Y. Grand Jury Subpoena*, slip op. at 1352-53 (2d Cir. Feb. 4, 1987) (no analysis of foreign interests).

Second, the Committee's attempt to obtain Mr. Secord's consent does no violence whatsoever to the Treaty, or the obligations of the United States thereunder. The Treaty offers a means of compelling banks to produce information; it does not cover instances where the depositor has waived his rights of nondisclosure.

Third, it is disingenuous for Mr. Secord to claim here that the Committee should follow the Treaty process when, as we understand, he is simultaneously objecting to the use of that process in Switzerland.¹⁰

3. The Nature of the Consent Is Not Misleading

Finally, Mr. Secord claims that the consent which the Committee has ordered him to sign implies voluntary conduct, when he is in fact being compelled. This is a markeweight contention. It will be no secret to anyone, including the foreign banks, that the consent was compelled. As the Fifth Circuit responded to a similar claim, it is difficult to understand how anyone could misconstrue the nature of this compelled consent.¹¹

The consent form here is prefaced by the Committee's order "direct[ing] Mr. Secord] to execute the following Consent Directive." (Secord Decl., Ex. C). In enforcing that order, the district court will not be asked to participate in an attempt to mislead any banking authorities or foreign governments. Rather, it will be asked simply to compel Mr. Secord to obey the Committee's order, which in turn compels Mr. Secord's consent. Cf. *N.D.N.Y. Grand Jury Subpoena*, slip op. at 1354-56.¹² In any event, should the court have any difficulty with the language of the order or the consent, the Committee would have no objection to amending the language in any technical respect consistent with the Committee's purpose.

D. COMPARATIVE EFFECTIVENESS OF CIVIL ACTION, CRIMINAL CERTIFICATION, AND INITIATING A CONTEMPT PROCEEDING BEFORE THE SENATE

Senate Resolution 23 empowers the Committee to "do everything necessary and appropriate under the laws and Constitution . . . to make the investigation and study" for which the Committee was created. Sen. Res. 23, sec. 5(a). Specifically, the Resolution authorizes the Committee "[t]o make to the Senate any recommendations, including recommendations for criminal or civil enforcement," resulting from the failure, by a witness, to appear or to produce documents as required by a subpoena. *Id.* sec. 5(d)(8). The Committee recommends that the Senate bring a civil enforcement action to compel Mr. Secord to sign the consent directive.

¹⁰ Furthermore, Mr. Secord's Treaty objection is totally irrelevant to the extent non-Swiss accounts are involved. The consent applies to all foreign accounts, it is not limited to accounts in Switzerland.

¹¹ The *Ghidoni* court concluded that the argument "border[ed] on [the] frivolous." 732 F.2d at 818 n.7.

¹² The Second Circuit's decision in *N.D.N.Y. Grand Jury Subpoena*, No. 86-6264, slip op. at 1354-56, is not to the contrary. There, the prosecutor refused to accept an order by the court that would indicate that the consent was compelled, because the prosecutor intended to use the "consent" to obtain an obstruction of justice indictment should the witness attempt to impede production by the foreign bank. Here, the compulsion appears on the face of the Committee's order and, as noted, if that language is insufficient the Committee is willing to amend it in any technical respect.

Three types of enforcement actions may be brought. The first is a civil proceeding, the second a criminal proceeding, and the third a proceeding before the Senate. Because we believe the third alternative inappropriate here,¹³ our consideration has focused solely on the other two. As between them, we believe that the civil proceeding is most likely to accomplish the goals of the Committee to compel compliance by the witness with speed, while at the same time affording Mr. Secord an opportunity for the judicial resolution of his objections.

In a civil action, the following procedure applies: the Senate adopts a resolution directing the Senate Legal Counsel to apply to the court for an order compelling the witness to testify. On an expedited basis, the court hears the witness' objections, and if it finds them unpersuasive, it orders him to testify. The witness may be recalled by the Committee, which may again seek his testimony. If he remains recalcitrant, the court would then be asked to apply sanctions, including incarceration, to induce compliance with the court's order. If ordered, incarceration could last until either the witness agreed to testify, or the Committee determined that it no longer needed his testimony. See 2 U.S.C. sec. 288; 28 U.S.C. 1364.

By contrast, a proceeding for criminal contempt requires the Senate to adopt a resolution directing the President Pro Tempore to certify to the United States Attorney the facts concerning a witness' failure to testify. The United States Attorney then presents the matter to a grand jury, which can indict the recalcitrant witness, leading to a prosecution for contempt of Congress. Conviction may be punished with a sentence of up to a year in prison. See 2 U.S.C. secs. 192, 194.

In a civil proceeding, the witness has a strong incentive to testify, since testifying will avoid the imposition of a coercive sanction, whereas in a criminal proceeding, the penalty remains, whether or not the witness has testified. A civil action is not punishment for the witness, but a way of coercing compliance with his duty to testify. It offers the witness an opportunity to secure judicial resolution of his objection to testifying, in time for him to comply before he would be incarcerated.

Not only will a civil proceeding provide Mr. Secord with the incentive to testify that a criminal referral does not, a civil action will be faster. The Committee desires a rapid resolution of this issue so that it may obtain the bank records it seeks for its investigation and hearings. Accordingly, the Committee recommends that the Senate authorize a civil enforcement proceeding to compel Mr. Secord to sign a consent directive authorizing the release of any foreign bank records.

¹³ The Senate has historically exercised authority to conduct a contempt proceeding, and to incarcerate recalcitrant or obstructive witnesses for contempt, without resort to judicial process. Its authority to do so, and that of the other body, have been repeatedly vindicated by the Supreme Court and lower courts. See *Jurney v. MacCracken*, 294 U.S. 125 (1935); *In re Chapman*, 166 U.S. 661 (1897); *Stewart v. Blaine*, 1 MacArthur 453 (D.D.C. 1874). Neither House has exercised that authority in the past three decades as the available judicial remedies have proven adequate. While the Senate may again employ inherent contempt authority in a special case where judicial remedies are not adequate or available, as might occur in a case of recalcitrance by an executive officer, this is not such a special case.

APPENDIX A

LETTER TO THE INDEPENDENT COUNSEL, MARCH 9, 1987

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE TO INVESTIGATE
COVERT ARMS TRANSACTIONS WITH IRAN,
Washington, DC, March 9, 1987.

HON. LAWRENCE E. WALSH,
Independent Counsel, U.S. Courthouse, Washington, DC.

DEAR JUDGE WALSH: We understand that you are investigating Lt. Col. Oliver North and others for conspiracy, unlawful conversion and fraud. We further understand that the Attorney General has made official requests on your behalf under the Treaty between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters ("the Treaty") for certain bank records at Credit Suisse in Geneva, Switzerland. We are writing to solicit your position on whether the Independent Counsel will furnish to the House Select Committee on Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition any Swiss bank records with which you are provided.

It is the view of our Committees that these bank records, and any others you may obtain pursuant to the Treaty, should be furnished to us. Article 5 of the Treaty places certain limitations on the use of documents obtained by a requesting State. For example, such documents shall not be introduced into evidence in a prosecution relating to an offense other than the offense for which assistance has been granted. However, so long as the documents are being used to investigate the same offense, the Treaty places no limitation on which investigative body may share the requested documents.

Both the Senate and House Select Committees are specifically empowered by resolution to investigate any violation of—law including conspiracy, unlawful conversion or fraud—relating to the transfer of arms to Iran and the diversion of funds therefrom to the contras. These are the same offenses for which the Attorney General has requested assistance under the Treaty. Moreover, the Committees are both duly constituted authorities under law to investigate offenses, and as such would be entitled to request these records directly under the Treaty. See Articles I, Section I(a) and Article 28, Section 2. See also 1982 Memorandum of Understanding between Switzerland and the United States interpreting the Treaty to apply to investigations conducted by the Securities and Exchange Commission, a body lacking criminal enforcement power, which "might be" dealt with by the criminal courts. Section II, Paragraph 3(a).

Accordingly, since the Committees are recognized authorities under the Treaty and are concerned with the investigation of the same offenses for which requests to Switzerland have already been made, it is our position that bank records you may receive, subject to appropriate protections as contained in Article 15 of the Treaty and the interpretative letter of May 25, 1973 concerning bank secrecy, should be made available to the Select Committees of the House and Senate.

We request that you advise us of your position as promptly as possible since your response will help us decide whether our Committees should make separate requests under the Treaty.

We look forward to hearing from you at your earliest convenience.

Sincerely,

LEE H. HAMILTON, *Chairman.*

DICK CHENEY,

Ranking Minority Member.

DANIEL K. INOUE,

Chairman, Senate Select Committee.

WARREN B. RUDMAN,

Vice Chairman, Senate Select Committee.

APPENDIX B

EXCERPTS FROM COMMITTEE HEARING, MARCH 11, 1987

Transcript, pages 73-74:

Senator TRIBLE. How about Swiss bank records? Have you receive any Swiss bank records?

Judge WALSH. No.

Senator TRIBLE. When you receive those will you share those with us?

Judge WALSH. There we have a problem that Mr. Liman, Mr. Nields and I have discussed at some length.

Senator TRIBLE. Can we talk about that here?

Judge WALSH. I do not see any reason why not. I will be perfectly candid. If I agree to share them I reduce my chance of getting them.

Senator TRIBLE. If you agree to share them you reduce your chances of getting them. That means you are not sharing them?

Judge WALSH. That means I am not agreeing to share them today.

Hearing Transcript, pages 80-81:

Senator SARBANES. Did I understand your response to Senator Tribble on the Swiss bank records to be that if the Swiss government knows before in the process of making a decision that the records are to be shared that it will be more difficult to acquire them?

Judge WALSH. Yes, sir. They restrict it to persons whom they recognize as prosecutorial.

Senator SARBANES. Is it your assumption that once they are turned over that their understandings will serve as a restraint on you or are you then in a different position to make an independent judgment?

Judge WALSH. My assumption is that they would serve as a restraint on my voluntary action. I have asked Arthur not to force me into a position on this any sooner than he thinks he has to because I do not see that it helps because if I have to take a position now the position would have to be that I would hold them to ourselves.

Mr. LIMAN. I understand Judge Walsh's position on that and that if amended his petition to cover us it would be subject again to months of delay, perhaps opening the whole proceeding up to rejections, and I do not disagree with that proposition that it would delay him.

Judge WALSH. Thank you.

APPENDIX C

DECLARATION OF RICHARD V. SECORD

I, Richard V. Secord, declare as follows:

1. The United States Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition (the "Committee") issued a subpoena to me to appear before it at a hearing on February 26, 1987. A copy of the subpoena is attached to this declaration as Exhibit A. I accepted service of the subpoena through my counsel, Thomas C. Green, on February 24, 1987.

2. I have been notified by the Committee, through its counsel, that the Chairman of the Committee, at the hearing on February 26, 1987, will request me to sign the Consent Directive which is attached to this declaration as Exhibit B, and, if I refuse, that the Chairman will ask the Committee to order me to sign it.

3. After consultation with my counsel I have decided not to sign the Consent Directive voluntarily.

4. I have been provided, with the subpoena, with a copy of the order which the Chairman will ask the Committee to issue at its hearing on February 26, 1987, based on my refusal to sign the Consent Directive. A copy of the order is attached as Exhibit C.

5. After consultation with my counsel, I have decided to refuse to obey the order or any substantially similar order of the Committee directing me to sign the Consent Directive. The sole basis for my refusal to sign the Consent Directive is my privilege against self-incrimination under the Fifth Amendment to the United States Constitution and other grounds.

6. I waive my opportunity to appear in person before the Committee with my counsel, to have the Committee's order stated to me personally, and to assert my constitutional objection directly to the members of the Committee.

7. I have been advised by the Committee, through its counsel, that I may submit a written statement, including a memorandum of legal authorities, which sets forth my objection to any order of the Committee directing me to sign the Consent Directive. My counsel has prepared a statement which is attached to this declaration as Exhibit D. I have no further argument to make to the Committee.

8. I waive any and all procedural defenses and objections which I might have to judicial enforcement of the Committee's order.

9. I have been advised by the Committee, through its counsel, that in return for this declaration, which I voluntarily make, I will not be required to appear before the Committee at its hearing on February 26, 1987.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed February 26, 1987.

RICHARD V. SECORD.

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES

To Richard V. Secord, Greeting:

Pursuant to lawful authority, You Are Hereby Commanded to appear before the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition of the Senate of the United States, on February 26, 1987, at 4:30 o'clock p.m., at their committee room, Hart Senate Office Building, Room 219, then and there to testify what you may know relative to the subject matters under consideration by said committee.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To any Select Committee staff member or U.S. Marshal to serve and return.

Given under my hand, by order of the committee, this 23 day of February, in the year of our Lord one thousand nine hundred and eighty-seven.

WARREN RUDMAN, *Vice Chairman.*

CONSENT DIRECTIVE

I, Richard V. Secord, of the State of Virginia, in the United States of America, do hereby direct any bank or trust company at which I have, or at which there exists, a bank account of any kind upon which I am authorized to draw, specifically including, but not limited to, Credit Suisse in Geneva, Switzerland, and its officers, employees, and agents, to disclose information and deliver copies of all documents of every nature in your possession or control which relates to the said bank accounts to any attorney of the United States Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, and to give evidence relevant thereto in any proceeding of the said United States Senate Select Committee, specifically including, but not limited to, any informal interview or any deposition or any hearing conducted by or under the authority of the said United States Senate Select Committee, and this shall be irrevocable authority for so doing. This direction is intended to apply, without limitation, to the Federal Banking Law of 1934 of Switzerland, as amended, and the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal, or authorized signatory, and shall include, without limitation, any accounts of any entity listed in Appendix A attached hereto or any such name followed by the designation Inc., Corp., Co., Ltd., or SA. This consent, however, shall not be construed as an admission that I am a principal of, or have any authority with respect to, any of the listed entities or their records or accounts.

Signature

Dated:

Sworn to before me this — day of —, 1987.

Notary Public.

APPENDIX A

ACE.

Airmach, Inc.

Albon Values.

Alph Services S.A.

Amalgamated Commercial Enterprises, Inc.

American Marketing and Consulting, Inc.

American National Management Corporation.

Baggett Transportation Company.

CSF.

CSF Investments Ltd.

CSFR Inv. Ltd.

Compagnie de Services Fiduciares SA.

Corporate Air Services, Inc.

Council for Democracy Education and Assistance.

Defex—Portugal.

Dolmy Business, Inc.

EAST Inc.

EATSCO.

Eagle Aviation Services and Transportation.

Egyptian American Transport Services, Inc.

Energy Resources International.

Gulf and Carribbean Foundation.

Gulf Marketing Consultants.

Hyde Park Holdings.

Hyde Park Square Corporation.

I. B. C.

I. C. Inc.

IDEA.

Institute For Democracy Education and Assistance.

Intercontinental Technology.

International Business Communications, Inc.

International Research and Trade.

Lake Resources Corp.

Lake Resources Inc.

Lilac Associates

Maule Air Inc.

NRAF Inc.

N. S. I.

National Endowment for Preservation of Libraries.

North South Issues.

Project Democracy.

R. M. Equipment Co.

S & S Trading Corp.

SOME Aviation.

Secord Associates.

Southern Air Transport, Inc.

Stanford Technology, Inc.

Stanford Technology Trading, Inc.

Stanford Technology Trading, Associates, Inc.

Systems Services International.

Toyco SA.

Trans World Arms Inc.

Udall Corporation.
 Udall Research Corporation.
 Udall Resources, Inc., S.A.

ORDER OF THE SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION FEBRUARY 26, 1987

Mr. INOUE, the Chairman of the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, submitted the following order to the Committee, which approved it by vote of—of its eleven members on the 26th day of February, 1987.

Ordered. That Richard V. Secord, having been subpoenaed to appear today before a hearing of the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, is directed to execute the Consent Directive attached hereto:

EXHIBIT D

Richard V. Secord refuses to sign the consent directive, Exhibit B to this Affidavit, for the following reasons. The judicial decisions which have considered whether a coerced signature violates an individual's Fifth Amendment right have concluded that the consent directive is neither testimonial nor incriminating. Specifically, these cases hold that the directive contains no implicit testimony that particular records exist.

We, who are advising Mr. Secord as his counsel, disagree with that conclusion. Our disagreement, however, is not the principal reason for objecting to the directive. Signing the directive is the equivalent of speech. There is simply no difference between an order compelling Mr. Secord to speak his consent and an order which compels him to sign a directive which only reduces his speech to writing.

The Fifth Amendment protects against coerced testimony. An executed consent directive is the equivalent of speech from the mouth of Mr. Secord. An individual is entitled to invoke the Fifth Amendment to protect against the risk of self-incrimination. An individual's testimony need not incriminate him directly. If his testimony might prove a significant link in a chain of evidence tending to establish his guilt, he is entitled to invoke his constitutional protection. *Marchetti v. United States*, 88 S.Ct. 697, 703 (1968). As far as we can tell, none of the cases which have approved a consent directive have considered the "link in a chain" theory.

There exists another way for the Committee to pursue Swiss bank records. The United States and Switzerland have executed a treaty for mutual assistance in criminal matters. By following the procedures specified therein, the United States can request bank records upon a proper showing. Invocation of the treaty provisions does no violence to Mr. Secord's constitutional rights. We think that in circumstances such as these, the Committee should be obliged to pursue a treaty request to its conclusion before it attempts to abridge Mr. Secord's constitutional rights. See, *Riley v. City of Chester*, 612 F.2d 708, 716-717 (3d Cir. 1979).

Finally, the consent directive, as proposed, is not a true statement. If Mr. Secord signs the proposed directive, it is not because

he has freely and voluntarily consented to the release of the records. Rather, it will be the result of an order compelling him to sign. Thus, an order by this Committee, or even a judicial order, directing Mr. Second to sign is tantamount to coercion to sign a false document. *In re N.D.N.Y. Grand Jury Subpoena #86-0351-S v. A Grand Jury Witness*, No. 86-6264 (2d Cir. February 4, 1987).

Mr. Second reserves the right to make additional arguments in defense of his constitutional rights at any time hereafter.

APPENDIX D

ORDER OF THE SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, FEBRUARY 26, 1987

Mr. INOUE, the Chairman of the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, submitted the following order to the Committee, which approved it by a vote of 11 of its 11 members on the 26th day of February, 1987.

Ordered, That Richard V. Secord, having been subpoenaed to appear today before a hearing of the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, is directed to execute the following Consent Directive:

CONSENT DIRECTIVE

I, Richard V. Secord, of the State of Virginia, in the United States of America, do hereby direct any bank or trust company at which I have, or at which there exists, a bank of any kind upon which I am authorized to draw, specifically including, but not limited to, Credit Suisse in Geneva, Switzerland, and its officers, employees, and agents, to disclose information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, and to give evidence relevant thereto in any proceeding of the said United States Senate Select Committee, specifically including, but not limited to, any informal interview or any deposition or any hearing conducted by or under the authority of the said United States Senate Select Committee, and this shall be irrevocable authority for so doing. This direction is intended to apply, without limitation, to the Federal Banking Law of 1934 of Switzerland, as amended, and the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal, or authorized signatory, and shall include, without limitation, any accounts of any entity listed in Appendix A attached hereto or any such name followed by the designation Inc., Corp., Co., Ltd., or SA. This consent, however, shall not be construed as an admission that I am a principal of, or have any authority with respect to, any of the listed entities or their records or accounts.

Signature

Dated:

Sworn to before me this — day of —, 1987

Notary Public.

APPENDIX A

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Airmarch, Inc.

Albon Values.

Alph Services S.A.

Amalgamated Commercial Enterprises, Inc.

American Marketing and Consulting, Inc.

American National Management Corporation.

Baggett Transportation Company.

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CSFR Inv. Ltd.

Compagnie de Services Fiduciares SA.

Corporate Air Services, Inc.

Council for Democracy Education and Assistance.

Defex—Portugal.

Dolmy Business, Inc.

EAST Inc.

EATSCO.

Eagle Aviation Services and Transportation.

Egyptian American Transport Services, Inc.

Energy Resources International.

Gulf and Carribbean Foundation.

Gulf Marketing Consultants.

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Hyde Park Square Corporation.

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NRAF Inc.

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North South Issues.

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R. M. Equipment Co.

S & S Trading Corp.

SOME Aviation.

Secord Associates.

Southern Air Transport, Inc.

Stanford Technology, Inc.

Stanford Technology Trading, Inc.

Stanford Technology Trading Associates, Inc.

Systems Services International.

Toyco SA.

Trans World Arms Inc.

Udall Corporation.
Udall Research Corporation.
Udall Resources, Inc., S.A.

APPENDIX E

LETTER TO COUNSEL FOR RICHARD V. SECORD, FEBRUARY 27, 1987

U.S. SENATE,
SELECT COMMITTEE ON SECRET MILITARY
ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION,
Washington, DC, February 27, 1987.

THOMAS C. GREEN, Esq.,
SHARP, GREEN & LANKFORD,
Washington, DC.

DEAR TOM: Pursuant to the direction of Chairman Inouye, I am writing to notify you that, at the hearing yesterday, the Committee issued the enclosed Order directing Mr. Secord to execute the Consent Directive that he has previously declined to sign.

The Committee understands from Mr. Secord's sworn declaration (executed February 26, 1987), that Mr. Secord refuses and will continue to refuse to obey the Committee's Order. The Committee will proceed on this understanding unless I hear from you by close of business this Monday, March 2, 1987, that Mr. Secord has decided to obey the Order.

Very truly yours,

MARK A. BELNICK.

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